

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

APR 26 1999

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of Request for)	
Review by Integrated Systems)	
and Internet Solutions, Inc.)	
of Decision of Universal)	
Service Administrator)	
)	
Federal-State Joint Board)	CC Docket No. 96-45
on Universal Service)	
)	
Changes to the Board of)	CC Docket No. 97-21
Directors of the National)	
Exchange Carrier Association)	
Inc.)	
)	
Tennessee State Department)	Application No. 18132
of Education, Application)	
(FCC Form 471) for Approval)	
of Funding)	

To: The Commission

REPLY TO OPPOSITIONS OF
STATE OF TENNESSE DEPARTMENT OF EDUCATION
AND EDUCATION NETWORKS OF AMERICA

Integrated Systems and Internet Solutions, Inc. ("ISIS 2000") hereby replies to the "Opposition to Request for Review of ISIS 2000" filed by the State of Tennessee Department of Education (the "Department") and "Opposition of Education Networks of America" ("ENA"), dated April 13, 1999.

The Department's claim that the "State's bid criteria awarded the maximum cost credits (30 points) to the bid achieving the lowest pre-discount price"¹ is contradicted by the record, which speaks for itself. As set forth in the RFP, ¶6.2.7, the maximum point award for cost factors (30 points) was awarded to the "proposal with the Highest Cost Factor." For ENA, the Department calculated the following Highest Cost Factor:

$$\frac{\$74,352,941 \text{ (Pre-discount contract price)}}{\$17,780,000 \text{ (Total state and local)}} = 4.182$$

In comparison, the Department calculated the following cost factor for ISIS 2000:

$$\frac{\$51,275,384 \text{ (Pre-discount contract price)}}{\$17,653,709 \text{ (Total state and local)}} = 2.905$$

As ENA's cost factor was higher, it received the maximum award of 30 points. ISIS 2000 received only 20.837 points based on the following RFP required calculation:

$$\frac{2.905 \text{ (Cost Factor of Proposal Being Evaluated)}}{4.182 \text{ (Highest Cost Factor)}} \times 30 = 20.837$$

¹Department Opposition, p. 7. ENA's opposition takes a slightly different tack, claiming only that the Department's bid criteria took pre-discount price into consideration (presumably as the numerator of the formula) and this is all that is required. ENA Opposition, pp. 4-6. Section 54.504, however, requires more than including the pre-discount price in a formula designed to select the highest pre-discount price.

On its face, the Department's bid evaluation formula was designed to, and did indeed, select the highest pre-discount price. The larger the disparity between the higher pre-discount cost bid and a lower pre-discount price bid, the greater the resulting cost proposal point preference (i.e., difference in points) awarded the higher pre-discount price bid.

Moreover, as the formula works in tandem with the \$7.5 million wash sale of the Department's "interest" in ConnectEN, its ultimate impact must be evaluated in this broader context. Absent such a transaction, the ratio between the overall pre-discount contract price (the numerator) and the Total state and local funds (the denominator) would be the same for each bidder and the formula would provide no basis to differentiate among bidders. The wash sale, however, changes the situation significantly by providing the means to increase the numerator (pre-discount price) without changing the denominator. For ENA, the numerator was calculated as follows:

Total State & Local (d.i)	\$17,780,000
Other funds (d.ii)	\$ 7,500,000
FCC Funds Pd. to Proposer (d.iv)	<u>\$49,072,941</u>
Total numerator (d.v) (Pre-discount price)	\$74,352,941

In effect, what the Department is presumed to have spent for purposes of determining the pre-discount contract price (the numerator)² is not used as the measure of the Department's actual expenditure (the denominator). It is a formula which measures and credits the degree of USF funding leverage obtainable from a fixed Department expenditure. As the Department itself stated in summarizing its reasons for selecting the ENA bid proposal:

"The State will pay either proposer the same amount of dollars. ENA demonstrated its understanding of the State's RFP requirements and maximized the opportunity for obtaining FCC E-rate funds. . . ."³

The \$7,500,000 wash sale not only substantially increases the numerator on its own, but its more significant effect is to enable the calculation of a significantly higher USF fund contribution ("FCC Funds Pd. to Proposer"). While the Total State and Local contribution of \$17,780,000 should have supported an FCC Funds payment (at the RFP assumed 66% discount level) of \$34,514,117 (based on a total

² The parenthetical references are to RFP Attachment 9.2 (Cost Proposal Format, Explanatory Notes, p. 46), which describes each term. See ISIS 2000 Opposition to Requests for Review filed by the State of Tennessee and ENA, April 13, 1999, Attachment 2.

³ Department Opposition to ISIS 2000 Objection to Application and Request for Expedited Declaratory Ruling, filed April 21, 1998, Attachment B, Department Contract Decision, Shrago April 12, 1998 Memorandum, p. 3.

pre-discount price of \$52,294,117), additionally including the \$7,500,000 Other Funds number in the calculation raises the USF funding payment by \$14,558,824 to \$49,072,941. The overall result is to inflate the pre-discount price by over \$22,000,000 ($\$7,500,000 + \$14,558,824 = \$22,058,824$) over what it should have been (\$52,294,117) based on the Department's actual contribution of \$17,780,000.

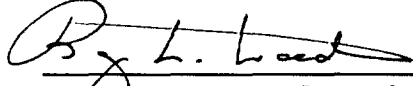
Notwithstanding the Department's undisputed bid criteria and evaluation of bidders thereunder in awarding the contract, the Department and ENA continue to claim that the lowest pre-discount priced proposal was nonetheless selected because purported evaluations of the ISIS 2000 proposal subsequent to the award of the contract to ENA indicate a much higher ISIS 2000 cost proposal. Again, the bid evaluation record speaks for itself. The differing projections and assumptions of higher cost now offered (which seem to go up further with each Department filing) are nothing more than post-contract award advocacy attempting to recast after-the-fact what was actually done by the Department. See ISIS 2000 Reply to Oppositions, filed April 27, 1998, pp. 20-27.

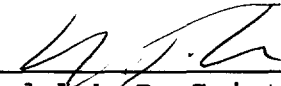
The Department's related contention that it could not have selected ENA over others "because of the possibility of

greater or less USF funding" because the contract was awarded "independent of USF funding" (Department Opposition, p. 8) is similarly contradicted by the record. Two interrelated but separate arrangements are embodied in the ENA contract; one for the continued operation of existing ConnectTEN facilities at the Department's current cost if USF funding is not obtained, and the other for the expansion of the network, using USF funding if it is obtained. The latter arrangement, which is the heart of the contract, is clearly contingent on USF funding. See ENA Contract, ¶A11.10; RFP, ¶5.2.4.1.3.

Respectfully submitted,

WILKES, ARTIS, HEDRICK & LANE,
Chartered

By: 
Ramsey L. Woodworth

By: 
Rudolph J. Geist
1666 K Street, N.W.,
Suite 1100
Washington, D.C. 20006
(202) 457-7800
Attorneys for Integrated
Systems and Internet
Solutions, Inc.

April 26, 1999

CERTIFICATE OF SERVICE

I, Ramsey L. Woodworth, hereby certify that copies of the foregoing pleading were served this 26th day of April, 1999, via first-class mail, postage prepaid, to the following individuals at the addresses listed below:

William Kennard, Chairman
Federal Communications Commission
The Portals
445 Twelfth Street, SW
12th Street Lobby, 8th Floor
Washington, DC 20554

Irene Flannery, Esq.
Chief, Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, SW
12th Street Lobby, 8th Floor
Washington, DC 20554

Commissioner Michael K. Powell
Federal Communications Commission
The Portals
445 Twelfth Street, SW
12th Street Lobby, 8th Floor
Washington, DC 20554

Kate Moore, CEO
Universal Service Administrative Co.
Schools & Libraries Division
2120 L Street, NW, Suite 600
Washington, D.C. 20037

Commissioner Gloria Tristani
Federal Communications Commission
The Portals
445 Twelfth Street, SW
12th Street Lobby, 8th Floor
Washington, DC 20554

Debra Kriete, Esq.
General Counsel
Universal Service Administrative Co.
Schools & Libraries Division
2120 L Street, NW, Suite 600
Washington, D.C. 20037

Commissioner Harold Furchgott-Roth
Federal Communications Commission
The Portals
445 Twelfth Street, SW
12th Street Lobby, 8th Floor
Washington, DC 20554

Lisa Zaina, Acting Deputy Bureau
Chief
Common Carrier Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, SW
12th Street Lobby, 8th Floor
Washington, DC 20554

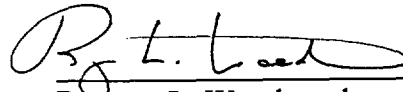
Commissioner Susan Ness
Federal Communications Commission
The Portals
445 Twelfth Street, SW
12th Street Lobby, 8th Floor
Washington, DC 20554

William K. Coulter, Esq.
Coudert Brothers
1627 I Street, N.W., Suite 1200
Washington, D.C. 20006
Counsel to Tennessee Dept. of
Education

Christopher J. Wright, Esq.
General Counsel
Federal Communications Commission
The Portals
445 Twelfth Street, SW
12th Street Lobby, 8th Floor
Washington, DC 20554

Jeffrey S. Linder, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
Counsel to Education Networks of
America

Lawrence E. Strikling, Chief
Common Carrier Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, SW
12th Street Lobby, 8th Floor
Washington, DC 20554

A handwritten signature in black ink, appearing to read "R. L. Woodworth", written over a horizontal line.

Ramsey L. Woodworth